



# CLAIMS AGAINST LANDLORDS AND THE DEFECTIVE PREMISES ACT 1972

Tom Panton, Guildhall Chambers, June 2016

## Introduction

1. Personal injury claims against landlords can raise difficult and technical questions of law. They are also inevitably highly facts-sensitive.
2. From the defendant perspective, the technicality of this area can actually prove beneficial. In the right case you may legitimately be able to seek early strikeout or summary judgment. The potential advantages of that approach in the QOCS era cannot be overstated. From the claimant perspective, it is actually quite easy to overlook potentially strong lines of argument. Thus for both sides there is real benefit in ensuring that you have a firm grasp of the sort of issues that can arise.
3. This talk and these notes are not an exhaustive analysis of the law in this area. The intention is to provide an outline of certain key principles and key areas of argument so as to assist in analysing this sort of case.
4. It is necessary to consider four key areas of potential liability:
  - a. Contract
  - b. Common law negligence
  - c. Occupiers' Liability
  - d. The Defective Premises Act 1972
5. As we will see, on the present state of the law the first and fourth of those are by far the most significant. It is however important to understand the second and third so as to ensure one is alive to the potential for them to be deployed erroneously, as they are with surprising regularity.
6. This talk will not attempt to analyse potentially complex questions concerning the precise nature and terms of the relationship between parties in individual cases (i.e. whether a tenancy exists, to what extent particular terms were or were not incorporated, whether that



matters, etc). In all of what follows the assumption is that there is a tenancy agreement in place between a landlord and a tenant. The tenant, of course, may not necessarily be the person who has suffered the injury giving rise to the claim.

## Contract

7. As in the general law, a contractual cause of action for personal injuries against a landlord may arise in one of two ways – a breach of **express** terms of the tenancy agreement, or a breach of **implied** terms.
8. In fact, and this cannot be emphasised enough, the terms of the tenancy agreement are likely to be of key significance in any personal injury claim brought against the landlord, regardless of which cause of action the claimant (who as noted above may not actually be the tenant) is relying upon. We will return to this point below. In practical terms this means that, at the risk of stating the obvious, one of the very first enquiries which **must** be made in any claim of this kind is as to the existence and whereabouts of the relevant tenancy agreement.
9. The next and vital point to make about contractual claims is that a claim for breach of contract as such can invariably only be brought by people who were parties to the contract<sup>1</sup>. This invariably means the tenants themselves.
10. The best illustration of this principle is probably Cavalier v Pope [1906] AC 428. In that case the property was let to the claimant's husband. The kitchen floor was dilapidated. The tenant drew this to the landlord's attention and threatened to leave. The landlord promised to put it right but did not. The tenant's wife (who was not a party to the tenancy agreement) fell through the kitchen floor and was injured. The House of Lords held she had no cause of action (this case is also relevant to negligence, of which more below). She was not a party to the contract and could not sue upon it. Her husband could sue, but not in respect of her injuries. Her claim failed.
11. Of course in many cases it **is** one of the tenants who is suing. Thus the next and crucial question is, what are the terms of the agreement? Would they cover the situation at hand?
12. Obviously this issue is facts-sensitive. The starting-point is to identify what has caused the accident or injury in question. The next step is to consider what coverage, if at all, that issue is given in the contractual terms.

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<sup>1</sup> It is of course legally possible for contracts to confer rights on third parties, but experience suggests that this is not yet exactly universal practice in the context of landlord and tenant arrangements.



13. The simplest example is where injury has been caused by some kind of defect in the property (for example a collapsed kitchen floor or faulty stairs). That fact of itself requires us to look at what (if anything) the tenancy agreement says about repairs<sup>2</sup>.
14. There is infinite scope for variety. It is conceivable, if these days unlikely, that the agreement will say nothing at all. More probably it will have some kind of repairing provision. Local authority or housing association agreements are extremely likely to do so. Looking at the precise scope of the repairing obligations placed upon the landlord in the individual case will tell you whether the particular defect in question is something which the landlord was obliged to address. If it was, there is a potential breach of contractual duty (we return to this point below).
15. Importantly, even in the absence of relevant express provisions you will still need to consider **implied terms**. By far the most important in the context of residential lettings are the terms implied by operation of statute, namely section 11 of the Landlord and Tenant Act 1985. In a nutshell, that section imposes repairing obligations onto landlords by implying contractual terms into short leases requiring the landlord to keep in good repair the structure and exterior of the property as well as installations for supply of gas, water, electricity, sanitation, heating and hot water.
16. Plainly that is quite an onerous list of obligations. The key point for present purposes is that these obligations are **contractual** in nature – the section operates, as noted above, by implying terms into the lease. Thus again, the key question is to consider whether your particular issue falls within the scope of those implied contractual obligations. If it does, the landlord is potentially in breach.
17. Critically however, even if the defect in question does fall within the landlord's express or implied obligations to repair, that does not necessarily of itself establish the claimant's cause of action. This is because of an old but important common law rule that **in respect of defects arising within the demised premises** the landlord is not to be regarded as having breached a contractual repairing obligation until he has had **notice** (actual or constructive) of the defect and a **reasonable opportunity to repair** it. At common law concepts of "notice" could be quite strict (e.g. it may well be that, to be valid, notice could only be given in a particular way, or to a particular person). This point is surprisingly often overlooked. In the right case, the absence of notice may defeat a claim entirely.
18. Having said that, the recent case of Edwards v Kumarasamy [2015] Ch 484 illustrates dramatically the potential limits of this principle. The case concerned a tripping accident on

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<sup>2</sup> Of course it is theoretically possible that a particular contract may impose very onerous obligations on a landlord, going well beyond mere repairing duties. I take repairs here as the most simple example, and the issue most often encountered in this sort of personal injury claim.



the communal path to a block of flats. The defendant landlord owned one of the flats (NB not the block or indeed the pathway) although crucially he enjoyed an express easement permitting use of the path. The critical point was that the path was **not** demised to the injured tenant. As the Court of Appeal found, that meant that there was no requirement for notice. This meant that, if the landlord had an obligation to repair the path, he was in breach as soon as the defect occurred whether or not he knew of it. As it happened the Court found he did have such an obligation by virtue of s11 of the 1985 Act (the reasoning in this regard is very interesting, involving detailed consideration of s11(1A); it is unnecessary to go into it here). Thus the defendant was in breach of contract without knowing it, and liable to the claimant for the injury sustained.

19. Edwards is on appeal to the Supreme Court (the hearing was on 5 May) and so this particular space needs watching. Do remember that its significance relates to issues arising **off** the demised premises. Issues arising on the demised premises will still require proof of actual or constructive notice to be actionable as a breach of contract.
20. A final point to make on contractual issues, and of considerable wider significance (to which we shall be returning below), concerns the meaning of the concept of “repair” and/or “maintenance”. It is now established beyond doubt by a line of key authorities that obligations to repair and maintain premises are **not the same as an obligation to make premises safe**. A landlord who is expressly or impliedly obliged to repair the property is not thereby under an obligation to introduce improvements to its safety.
21. This important principle emerges probably most clearly from Alker v Collingwood Housing Association [2007] 1 WLR 2230 and very recently Sternbaum v Dhesi [2016] EWCA Civ 155.
22. Alker involved a pane of glass which, contrary to modern building standards (although not those in force at the time when the property was built), was not safety glass. The panel however was perfectly intact and was in no sense in “disrepair”. The claimant was injured when her arm went through and shattered the glass. The Court of Appeal held that the landlord’s obligation to maintain or repair a property and keep it in good condition did not require it to replace the glass with modern impact-resistant glazing.
23. Sternbaum involved a fall down a steep flight of stairs with no handrail (its facts were quite close to those of the previously often-cited Hannon v Hillingdon Homes Ltd [2012] EWHC 1437 (QB) although the result was quite different as we shall see). The evidence suggested that the stairway had once had a handrail, albeit before the tenancy began. The Court of Appeal emphatically rejected the suggestion that this state of affairs amounted to “disrepair”. The staircase was of a kind that might be found in hundreds of old properties around the



country. Whilst undoubtedly hazardous, it was not something that engaged the landlord's repairing obligations.

24. Interestingly, and contrary to the finding in Hannon, the court doubted whether a handrail or banister could be suggested to be part of the "structure" of the premises for the purposes of s11 of the 1985 Act. It also appeared to place emphasis on the fact that, unlike in Hannon, there had been no banister during the currency of the lease. It may well be that Hannon comes to be viewed as a decision very much confined to its own facts in future.
25. We will see below how these latter principles impact significantly on other relevant areas of the law – in particular the Defective Premises Act.

### Common law negligence

26. We can address this issue quite shortly because, bluntly, the legal position is that common-law duties of care only rarely arise in this context.
27. Probably the best-known statement of principle is to be found in Lord Macnaghten's judgment in Cavalier (above):

"The law laid down by the Court of Common Pleas in the passage quoted by the Master of the Rolls from the judgment of Erle CJ in Robbins v Jones (1863) 15 CB (NS) 221 is beyond question: 'A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term: for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any'"

28. More recently in Alker (above) it was said that "Where Cavalier v Pope applies, a duty of care does not in the absence of fraud arise upon the letting of a dilapidated premises even if the landlord actually knows or ought to have known that they are dilapidated."
29. Still more recently Drysdale v Hedges [2012] EWHC 4131 (QB) confirms that this remains the rule.
30. Drysdale identified an exception to the rule where the landlord himself actually **creates a danger** on the premises. In that case the landlord had chosen to paint a step, which had the



(unintended) effect of making it more slippery. On the facts the court found that this did not amount to a breach of duty, and so the claimant lost, but the important point for present purposes is that the landlord did owe a duty of care in that specific regard.

31. The other key exception is where the landlord himself is responsible for the design or building of the premises in the first place. In Rimmer v Liverpool City Council [1985] QB 1 the Court of Appeal held that a landlord who is not only a landlord but who also designed or built premises owes a duty of care to persons who might reasonably be expected to be affected by the condition of the premises.
32. It used to be said that landlords could be liable at common law for “misfeasance” but not “nonfeasance”. That sort of phraseology has perhaps fallen out of common parlance, but the distinction remains valid.
33. The common law in this area has often been criticised as harsh. This is part of the reason why the Defective Premises legislation was passed.

### **Occupiers’ liability**

34. Again we can deal with this area quite shortly. One sees the Occupiers’ Liability Act 1957 being pleaded by tenants against landlords with surprising regularity, but this is almost invariably misguided. The reason is that, in demising his premises to the tenant, the landlord is invariably treated as having surrendered the practical **control** of the premises which is the essential ingredient of the status of “occupier” under the Act. The tenant, and not the landlord, will almost certainly be the “occupier” of the premises demised.
35. This is not a new development – Wheat v E Lacon & Co Ltd [1966] AC 552 illustrated the relevant principles very clearly fifty years ago.
36. More recently the Court in Drysdale (above) made essentially the same point (see paragraphs 69-77 of Mr John Leighton Williams QC’s very detailed judgement). It also observed that the original Occupiers’ Liability Act 1957, s4 (the statutory precursor to s4 of the Defective Premises Act) contained detailed provisions as to a landlord’s liability to his tenant’s visitors. The Court thought it significant that Parliament had repealed that section and replaced it with s4 of the Defective Premises Act. “I conclude”, said the Judge, “that a landlord’s duty of care should normally be confined to that set out in section 4 of the [Defective Premises] Act” – i.e. it would not usually involve questions of occupiers’ liability.



37. Of course, in individual cases you may encounter situations where a landlord retained control of the relevant part of the premises, wholly or in part. Wheat itself illustrates that, on the right facts, there may be more than one occupier of premises or part of premises. The best example of this sort of situation would be where injuries are caused by a defect in common parts of premises, still under the landlord's control. The key point for present purposes however is that, when dealing with the demised part of the premises, as we very frequently are, the 1957 Act is unlikely to assist.

### **The Defective Premises Act 1972**

38. As noted above, the DPA was not the first piece of legislation to address a landlord's potential liability to persons other than his tenant. The harshness of the common law had already led Parliament to try to address the situation in the former s4 of the Occupiers' Liability Act 1957.

39. Over time it became clear that this provision had a number of weaknesses, chiefly because of its occupiers' liability context. It only protected "visitors". It only imposed liability where the landlord had **obligations** to repair and so could be circumvented by restrictive drafting of leases. Finally, it only imposed liability where the landlord's default was such as might be actionable at the suit of the occupier. This tended to produce technical arguments about landlords' liability to tenants and, in particular, requirements for formal notice. Hence the perceived need for reform.

40. The eventual Defective Premises Act 1972 imposed a number of important statutory duties, going wider than its occupiers' liability ancestor. This talk will not attempt to address them all in detail. Section 1 imposed a duty to build dwellings properly. Section 3 importantly provided that duties of care upon those constructing, repairing and maintaining buildings (amongst other things) survive the subsequent disposal of the premises by that person. Most importantly for present purposes, section 4 provided for landlords to owe a duty of care arising by virtue of obligations and rights of entry in respect of maintenance and repair.

41. The key provisions of section 4 of the DPA repay careful reading and so are set out in full below:

**4(1) Where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to**



take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.

(2) The said duty is owed if the landlord knows (whether as the result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known of the relevant defect.

(3) In this section “relevant defect” means a defect in the state of the premises existing at or after the material time and arising from, or continuing because of, an act or omission by the landlord which constitutes or would if he had had notice of the defect, have constituted a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises; and for the purposes of the foregoing provision “the material time” means—

(a) where the tenancy commenced before this Act, the commencement of this Act; and

(b) in all other cases, the earliest of the following times, that is to say—

(i) the time when the tenancy commences;

(ii) the time when the tenancy agreement is entered into;

(iii) the time when possession is taken of the premises in contemplation of the letting.

(4) Where premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises, then, as from the time when he first is, or by notice or otherwise can put himself, in a position to exercise the right and so long as he is or can put himself in that position, he shall be treated for the purposes of subsections (1) to (3) above (but for no other purpose) as if he were under an obligation to the tenant for that description of maintenance or repair of the premises; but the landlord shall not owe the tenant any duty by virtue of this subsection in respect of any defect in the state of the premises arising from, or continuing because of, a failure to carry out an obligation expressly imposed on the tenant by the tenancy.

(5) For the purposes of this section obligations imposed or rights given by any enactment in virtue of a tenancy shall be treated as imposed or given by the tenancy.

(6) This section applies to a right of occupation given by contract or any enactment and not amounting to a tenancy as if the right were a tenancy, and “tenancy” and cognate expressions shall be construed accordingly.





42. These provisions are plainly somewhat tortuous (not to say torturous). This has encouraged a certain amount of attempted forensic gymnastics by the personal injury Bar. Claimants in various recent cases have argued that the section's overall effect is to impose strict or quasi-strict liability. In ascending order of court importance, the key cases have been:

- a. Pritchard v Caerphilly CBC (Cardiff County Court, 26/11/13, HHJ Seys-Llewellyn QC).
- b. Lafferty v Newark & Sherwood DC (High Court) [2016] EWHC 320 (QB) (Jay J).
- c. Argue v Northern Ireland Housing Executive (Northern Ireland Court of Appeal<sup>3</sup>) [2016] NICA 18.

43. These attempts have all failed. The Claimant in Lafferty is reported to be seeking permission to appeal, and so to that extent we must watch this space. For the time being, however, the idea of strict liability has not found favour.

44. On the traditional approach to section 4, analysis should proceed broadly as follows.

45. In some respects, the section is comparatively simple. Plainly it only applies to premises "let under a tenancy" (thus removing at a stroke cases involving premises not demised). Also the duty imposed upon the landlord (if imposed at all) is clearly for the benefit of these persons:

**"persons who might reasonably be expected to be affected by defects in the state of the premises"**

46. ... which neatly removes the need for questions of tenant status, "visitor" status, et cetera. In reality there is probably little scope for litigation over this comparatively simple concept.

47. Then, if it is owed, the duty imposed by the section is in these terms:

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<sup>3</sup> Plainly this most recent decision does not constitute binding precedent in England and Wales but the reasoning, applied to a statute of very similar if not identical wording, might well be found compelling in this jurisdiction.



**“to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect”**

48. Again this is not difficult language – it is clearly resonant of section 4’s occupiers’ liability heritage. The Courts are entirely familiar with considering the question of whether reasonable care has been taken, and reasonable safety ensured, on the facts.
49. Where difficulties have tended to arise is in deciding **whether the duty is owed at all**. In this respect the section is not straightforward. What follows is one attempt to untangle the language. The attempt is undoubtedly imperfect – at the end of the day, in any DPA case, there is no substitute for reading section 4 carefully and working through its provisions line by line.
50. The key requirements, which have been referred to as “gateway criteria” are these:

Firstly

**a. An express or implied obligation to the tenant for maintenance or repair.**

**OR**

**b. An express or implied right of entry for the purposes of carrying out maintenance or repair.**

This immediately demonstrates why you need to consider the contract. Only by so doing will you identify the existence and the scope of any relevant (express or implied) obligation or right of entry. Of course, as we have seen, in many cases section 11 of the Landlord and Tenant Act 1985 will impose a repairing obligation – the only question will be whether ‘your’ defect falls within its provisions.

Secondly

**A “relevant defect” as defined in subsection (3).**

Note from the wording of the subsection how this concept is tied specifically to the landlord’s obligation for maintenance or repair. Again therefore your starting-point will be the contract and its express or implied repairing provisions.



Note that there are timing requirements as to when the defect arose although one suspects those will not be particularly key in a great many cases.

More importantly it is here, of course, that Alker and Sternbaum bite (and Hannon may turn out to be problematic). Both cases show clearly that to be “relevant” a defect must involve a **want of repair**. It is simply not enough to point to some hazardous feature of the premises and argue that it could have been safer. The DPA, like the 1985 Act, is concerned with obligations of repair and maintenance, not making safe. The policy reasons for this approach are probably self-evident. A general duty on landlords to provide safe premises would have, to put it mildly, significant practical impact.

### Thirdly

#### ***That the landlord knows, or ought to have known, of the relevant defect.***

NB that Sykes v Harry & anr [2001] QB 1014 (a case involving a defective gas installation) shows quite clearly that this is NOT a requirement for “notice” in the technical common law sense. All that is required is actual or constructive knowledge. Again, this is not an uncommon or particularly difficult concept in law.

NB also that the claimants’ argument in Lafferty, et al, was an attempt to draw the sting from precisely this provision. Essentially it was argued that this knowledge requirement was, for slightly complicated reasons (arising from an arguably rather tendentious reading of subsection 4(4)), otiose. Thus far, as noted above, that argument has failed.

51. This latter (knowledge) requirement is probably the most common triable issue. Surprisingly, as with contractual notice, it is often overlooked or simply ignored.
52. Actual knowledge is a straightforward issue of fact. Either the landlord knew or s/he did not. In practical terms the point does require careful analysis of the witness evidence. Claimants frequently allege prior reporting, and landlords invariably deny it. The credibility of the accusation or, as the case may be, the denial, will plainly be of fundamental importance.



53. Constructive knowledge can be easy to assert but harder to prove. This is partly because the easiest argument to run is that the landlord should have inspected the premises, and that had he done so he would have known about the defect. However there is as yet no generally-recognised duty upon landlords to routinely inspect their premises (although of course many in fact do). Argue (above) is a good example of a court finding that it would have been too onerous to expect a landlord to inspect the relevant feature of the premises (in that case a faulty step, hidden by carpet) before an accident occurred.
54. The decision in Sykes illustrates that on particular facts a Court may find that a landlord could and should have inspected regularly and that, had he done so, he would have had knowledge of the defect. Gas appliances however were probably the clearest and strongest possible case for that sort of finding. Cases involving other types of defect will be more difficult. Quite recently in Dodd v Raeburn Estates & others [2016] EWHC 262 (QB) it was made clear that Sykes was not to be taken as imposing a general duty on landlords to inspect.
55. That said, as noted above many landlords do in fact inspect. Still more, whilst not inspecting, will send in agents of various kinds to carry out works of various kinds. The presence of such people, and their opportunities to inspect or detect a defect, can easily set up the constructive knowledge argument. Plainly all depends on the facts.
56. Leaving aside the Lafferty-type arguments (which may conceivably be given the kiss of life by the Court of Appeal in that case – we shall have to see) it is the precise **scope** of this knowledge requirement which is perhaps the most obvious candidate for further litigation and clarification from the higher courts.

## Conclusions

57. The key points arising from the foregoing are as follows:
- a. **Always** request the tenancy **contract** and consider it carefully early on.
  - b. Get a good grasp of the core technicalities (in particular the limited scope of common law and occupiers' liability, no duty to make safe, requirements for notice and/or knowledge of the defect). In the right case, or the wrong case, a claim or defence may be vulnerable to strike out.
  - c. Identification of the really key issues in the case is obviously vital in any personal injury litigation. In this area, however, it is plainly of particular importance.